

U.S. Department of Homeland Security

Office of the Chief Counsel
601 South 12th Street
Arlington, VA 20598-6002



Transportation
Security
Administration

224862

April 10, 2009

The Honorable Anne K. Quinlan, Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

RE: Union Pacific Railroad Company
Petition for Declaratory Order
STB Finance Docket No. 35219

Dear Ms. Quinlan:

Enclosed for filing in the above referenced matter is the "Comments of the Transportation Security Administration, Department of Homeland Security" in response to the Surface Transportation Board's institution of a declaratory order proceeding on March 10, 2009. Please direct any questions about this filing to me at 571-227-2728 or Mardi.Thompson@dhs.gov

Thank you for your assistance.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Mardi Ruth Thompson".

Mardi Ruth Thompson
Deputy Chief Counsel
for Regulations & Security Standards

Enclosure

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.**

Finance Docket No. 35219

**Union Pacific Railroad Company
Petition for a Declaratory Order**

**COMMENTS OF THE TRANSPORTATION SECURITY ADMINISTRATION,
UNITED STATES DEPARTMENT OF HOMELAND SECURITY**

I. Introduction

The Transportation Security Administration (TSA) appreciates the letter from former Surface Transportation Board (STB) Chairman Charles D. Nottingham dated March 10, 2009 to Acting Administrator Gale D. Rossides, inviting and encouraging TSA to provide its views on the Union Pacific Railroad Company's (Petitioner) petition to the STB for a declaratory order, submitted on February 18, 2009. Petitioner asserts that it should not be required to post common carriage rates for the transportation of chlorine from Utah to destinations in Texas and Louisiana located at least 1,400 miles away. Petitioner contends that customers in these locations can obtain chlorine from alternate sources that are closer and, therefore, transporting chlorine from these locations would present less risk than transporting it from Utah. Both Petitioner and the Board recognize that the issues involved in the petition transcend common carrier rates; they involve issues of safety and security.

"The Secretary of Homeland Security is the principal Federal official responsible for transportation security."¹ Under the Aviation and Transportation Security Act (ATSA)² and delegated authority from the Secretary of Homeland Security, TSA has broad responsibility and authority for "security in all modes of transportation . . . including security responsibilities . . . over modes of transportation that are exercised by the Department of Transportation."³ The Department of Transportation (DOT) also has various rail safety and security roles as articulated in certain statutes and agreements between the two departments.⁴

TSA's authority with respect to transportation security is comprehensive and supported with specific powers related to the identification of security risks, the development of regulations and other measures to reduce these risks, and the enforcement of regulations and other requirements.⁵ TSA has exercised this authority to secure transportation modes including both aviation and surface modes, including rail.⁶

The Federal hazardous materials transportation law authorizes the Secretary of DOT to "prescribe regulations for the safe transportation, including security, of

¹ Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. 110-53 (August 3, 2007) (9/11 Commission Act), section 1310, codified at 6 U.S.C. § 1117.

² Pub. L. 107-71, 115 Stat. 597 (November 19, 2001).

³ See 49 U.S.C. 114(d). The TSA Assistant Secretary's current authorities under ATSA have been delegated by the Secretary of Homeland Security. Section 403(2) of the Homeland Security Act (HSA) of 2002, Pub. L. 107-296, 116 Stat. 2315 (2002), transferred all functions of TSA, including those of the Secretary of Transportation and the Under Secretary of Transportation of Security related to TSA, to the Secretary of Homeland Security. Pursuant to DHS Delegation Number 7060.2, the Secretary delegated to the Assistant Secretary (then referred to as the Administrator of TSA), subject to the Secretary's guidance and control, the authority vested in the Secretary with respect to TSA, including that in section 403(2) of the HSA.

⁴ TSA understands that DOI will submit its own comments in this proceeding.

⁵ As part of its security mission, TSA is responsible for assessing intelligence and other information to identify individuals who pose a threat to transportation security; enforcing security-related regulations and requirements; ensuring the adequacy of security measures for the transportation of cargo; overseeing the implementation and ensuring the adequacy of security measures at transportation facilities; and carrying out other appropriate duties relating to transportation security. 49 U.S.C. 114(f). TSA has broad regulatory authority to achieve ATSA's objectives. 49 U.S.C. 114(l)(1).

⁶ 49 U.S.C. § 114(f) and (l).

hazardous material in intrastate, interstate, and foreign commerce."⁷

As the authorities cited above make clear, TSA and DOT are the Federal agencies responsible for addressing safety and security risks associated with the rail shipments of chlorine and other hazardous materials.

II. Discussion

TSA and DOT regulations provide adequate measures for the safety and security of the transportation of chlorine by rail. In rulemakings published on November 26, 2008, as well as prior DOT rulemakings, TSA and DOT analyzed the risks to safety and security of transporting chlorine and other hazardous materials by rail and established comprehensive regulatory programs to address these risks. *See* 73 FR 72130 (TSA rule); 73 FR 72181 (DOT rule).⁸ When rail shipments conform to the TSA and DOT regulations, the risks of transporting chlorine by rail are appropriately mitigated and such movements can take place without posing unnecessary safety and security risks. In discharging its responsibilities as the lead federal agency for transportation security, TSA is developing other rulemakings to make further enhancements to rail transportation security. For instance, TSA is working on rulemakings to propose requiring certain railroad operators to conduct security training for frontline employees and to require that certain railroad operators conduct vulnerability assessments and prepare security plans, as required by the 9/11 Commission Act.⁹ In addition, DOT continues to work on

⁷ 49 U.S.C. 5101 et seq., as amended by Sec. 1711 of the Homeland Security Act, and Title VII of the 2005 Safe, Accountable, Flexible and Efficient Transportation Equity Act—A Legacy for Users (SAFETEA-LU).

⁸ Congress directed DOT to complete its rule in the 9/11 Commission Act, section 1551. As discussed in the DOT comments, DOT has comprehensive regulations governing the rail shipments of hazardous materials.

⁹ 9/11 Commission Act sections 1512 and 1517

enhancements to rail transportation safety and security, as set forth in detail in its comments.

The shortest route of transportation for chlorine may not be the most secure. The petition assumes that the rail transportation of chlorine over shorter distances is safer and more secure than transporting the chlorine over longer distances. For example, in its Argument, Petitioner states: "Transportation by rail is safe, but the longer chlorine is in transit and the more switching and handoffs that are required, the higher the number of people put at risk and the greater the exposure to terrorist attacks that worry government security agencies." Petition, redacted version, at 3. It is not always the case, however, that transportation over shorter distances means a lower security risk. Many factors could lead to a conclusion that a longer route may be preferable to a shorter route. Under the DOT rule, a railroad carrier must consider a minimum of 27 specific factors before selecting the most appropriate route. While trip length and population density are two of those factors, DOT has concluded that at least 25 other factors are also relevant to determining the best route.¹⁰ TSA's rule mitigates the risks of hand-offs by requiring rail carriers to comply with "chain-of-custody" procedures designed to provide additional security. See 49 CFR 1580.107. Allowing Petitioner or other railroad carriers to determine that they will not transport chlorine based only on distance traveled and population density will not necessarily result in better safety or security.

TSA's activities to enhance rail transportation security were not intended to inhibit transportation TSA's mission is to protect the Nation's transportation systems to ensure freedom of movement for people and commerce. TSA has concluded that the risks of shipping of chlorine can be appropriately mitigated. If Petitioner believes that

¹⁰ 49 CFR part 172, Appendix D

TSA's regulations and policies were designed to inhibit the transportation of hazardous materials, Petitioner is mistaken. Petitioner states that TSA and the Federal Railroad Administration have adopted policies encouraging railroads and shippers to reduce unnecessary shipments of toxic inhalation hazard (TIH) materials¹¹ in order to reduce exposure to terrorist attacks. Petition, redacted version, at 3-4. Carriage in full compliance with applicable safety and security rules appropriately addresses the substantive risks involved.

As noted above, the TSA rule requires security measures that mitigate security risks associated with shipments of chlorine. The TSA rule establishes particular "chain-of-custody" requirements for freight railroad carriers and certain shippers and receivers of hazardous materials such as chlorine. 49 CFR 1580.107. These requirements are intended to make sure that there is a secure transfer of custody of these materials between freight railroad carriers, between freight railroad carriers and shippers, and between freight railroad carriers and receivers. TSA has concluded that these and the remaining requirements of TSA's rule provide adequate security for rail shipments of chlorine, even through urban areas. Further, as noted above, TSA continues to consider what additional security enhancements should be made in the future.

Petitioner is free to and encouraged to adopt additional measures. For example, TSA's guidance to freight railroad carriers, issued in conjunction with DOT in November, 2006,¹² encourages carriers to voluntarily put in place 27 security measures, including measures to decrease the time PIH materials spend in high threat urban areas

¹¹ TIH materials are also known as "materials poisonous by inhalation" or "PIH materials."

¹² The initial guidance was issued on November 21, 2006, and TSA and DOI issued supplementary guidance on February 12, 2007. These guidance documents are available on TSA's public web site at http://www.tsa.gov/assets/pdf/Supplement_No%201_TIH-SAI.pdf

(IITUAs), and improve the security of the rail cars and reduce the vulnerability of the public while these cars are in HTUAs. TSA has determined that freight railroad carriers have significantly reduced the dwell time of PIH material cars in IITUAs and the amount of time these cars are left unattended. TSA has not urged, and its rules provide no basis for, freight railroad carriers to discontinue the transportation of such shipments.

Overall, TSA's policies are geared to provide for the secure transportation of chlorine and other hazardous materials, not to discourage their transport. Further, granting the petition to allow the Petitioner to determine when it could decline to transport chlorine based on the Petitioner's views of when closer adequate supplies were available could have unintended consequences to the suppliers and users of chlorine, as well as the general public.

III. Conclusion

In sum, TSA and DOT have established a regulatory and policy framework that safeguards shipments of chlorine by rail. Granting the petition will not enhance transportation security and safety and may have adverse unintended consequences. Future rail security and safety enhancements should be accomplished through DHS and DOT rulemakings. DHS and DOT are committed to protecting the security and safety of

the Nation's rail transportation system to ensure freedom of movement for people and commerce.

Respectfully submitted,



John P. Sammon
Assistant Administrator
Transportation Sector Network
Management

Dated: April 10, 2009

I, John P. Sammon, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to sponsor the comments

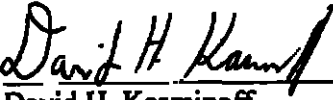
Executed April 10, 2009



John P. Sammon

Certificate of Service

I hereby certify that I have on this 10th day of April 2009 served a copy of the foregoing "Comments of the Transportation Security Administration, Department of Homeland Security" on Tonya W. Conley, Union Pacific Railroad Company, 1400 Douglas Street, Omaha, NE 68179, via first class mail and via email at twconley@up.com, and served all other parties of record via first class mail.



David H. Kasminoff
Senior Counsel for Regulations